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Is Intent Required - Zero Tolerance, Scienter, and the Substantive Due Process Rights of Students ?

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NOTES

IS INTENT REQUIRED?

ZERO TOLERANCE, SCIENTER, AND THE SUBSTANTIVE DUE PROCESS RIGHTS OF STUDENTS

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[1]

The emergence of zero tolerance policies in America's public schools has generated a great deal of controversy during the past decade. Though the creation of such policies dates back to the passage of the Gun-Free Schools Act of 1994,[2] the outrage over its implications entered the spotlight in 1999. Hundreds of people in Decatur, Illinois, and thousands across the nation protested the expulsion of seven high school boys for fighting at a high school football game.[3] Ultimately, Jesse Jackson and the Rainbow Coalition went to Decatur to demonstrate against these policies.[4]

Zero tolerance has recently come under attack by many different organizations. At its meeting in February 2001, the American Bar Association approved a resolution opposing zero tolerance policies in schools, expressing concern about regulations that require automatic punishment without regard to circumstances.[5] Groups such as the Rutherford Institute have begun to track and fight such policies through the representation of students affected by the imposition of zero tolerance laws.[6]

Why do these policies generate so much controversy? At their inception, these regulations were heralded by the American

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[1] Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[2] 20 U.S.C. § 8921 (2000) (repealed 2002).

[3] *See* Joan M. Wasser, *Zeroing In on Zero Tolerance*, 15 J.L. & POL. 747 (1999).

[4] *See* Kerry A. White, *Decatur, Ill., Embroiled in Expulsion Dispute*, EDUC. WK., Nov. 17, 1999, at 3.

[5] ABA, RESOLUTION TO THE HOUSE DELEGATES 14 (Feb. 19, 2001), *available at* http://www.abanet.org/crimjust/juvjus/zerotolreport.html.

[6] *See* John Leo, *Cracking Down on Kids*, U.S. NEWS & WORLD REP., Dec. 13, 1999, at 19.

Federation of Teachers, who urged a nationwide adoption of zero tolerance policies to curb the effects of violence in America's schools.[7] Ultimately, the Gun-Free Schools Act of 1994 was passed, whereby each state receiving federal funding pursuant to the Elementary and Secondary Education Act must expel, for at least one year, any student who possesses a weapon on school grounds.[8] Many states have elected to go beyond the federal legislation by expanding the definition of "weapon" to include knives and other instrumentalities.[9] Though most people would seemingly agree that schools should adopt tough policies to curb school violence, the fact that many of these regulations lack a scienter requirement has generated much debate. Many courts have struggled with the constitutionality of a school policy that does not consider whether a student intended to violate a rule prohibiting possession of knives, drugs, or alcohol on school grounds or at school activities.[10]

Recently, the United States Court of Appeals for the Sixth Circuit essentially struck down zero tolerance policies, stating in *Seal v. Morgan* that "suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon" would violate substantive due process.[11] The court ultimately concluded that such policies are irrational.[12] The Sixth Circuit is the first appellate court to expressly rule that such policies are unconstitutional; the opinions of various circuit courts of appeal and district courts have come to mixed conclusions on the issue.[13] Most recently, in an unpublished opinion, the United States Court of Appeals for the Fourth Circuit upheld zero toler-

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[7] *See Teachers' Union Wants to Expel Students Who Carry Guns*, N.Y. TIMES, July 19, 1994, at A13.

[8] *See* 20 U.S.C. § 8921 (2000) (repealed 2002); *see also* Laura Beresh-Taylor, *Preventing Violence in Ohio's Schools*, 33 AKRON L. REV. 311, 323 (2000) (discussing the methods that can be used by schools to prevent violence and the often conflicting rights of students).

[9] Wasser, *supra* note 3, at 750. The federal definition defines "weapon" to include guns, bombs, grenades, and other devices. 18 U.S.C. § 921 (1995).

[10] Beresh-Taylor, *supra* note 8, at 320-23; *see infra* Part II.

[11] *See* Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000). The dissent argued that the majority created a system whereby school zero tolerance policies throughout the circuit would now need to contain an express intent requirement, essentially destroying the essence of a zero tolerance policy. *Id.* at 575 (Suhreinrich, J., dissenting).

[12] *Id.* at 578.

[13] *Compare id. with* Ratner v. Loudoun County Pub. Sch., 2001 U.S. App. LEXIS 16941 (4th Cir. 2001) (finding that there was no due process violation where student was suspended for ten days after school officials found a knife he had confiscated from his suicidal friend), *cert denied*, 2002 WL 75715 (U.S.); Arthur A. v. Stroudsburg Area Sch. Dist., 141 F. Supp. 2d 502 (M.D. Pa. 2001) (finding that a student's right to due process was not violated by a ten-day suspension for making terrorist threats); Bundick v. Bay City Indep. Sch. Dist., 140 F. Supp. 2d 735 (S.D. Tex. 2001) (holding that no due process violation existed where a student was discovered to have a knife in his car on school grounds).

ance policies, stating that "federal courts are not properly called upon to judge the wisdom of a zero tolerance policy of the sort alleged to be in place." [14]

The question of whether zero tolerance policies violate the substantive due process rights of students by not considering scienter as an element of the offense has important implications for school administration. School districts, confronted with inconsistent court opinions, are currently lacking clear guidance on how to constitutionally implement such policies. It is unclear whether school districts need to include an intent requirement in any policy that they create. This uncertainty has led to an overall evaluation of the tools that school districts can utilize to maintain order and safety in their schools.

Concerning the legality of zero tolerance, it is unclear whether federal courts should be interfering with the implementation of these policies in the first place. Considering statements from the Supreme Court admonishing lower courts against interfering with the operations of public schools, it is uncertain what role federal courts should play in the adjudication of school policies.[15] It is also unclear whether these zero tolerance policies could or should fall within the strict liability exceptions to the criminal law necessity for mens rea or "guilty mind." Though school disciplinary decisions are not criminal matters, the use of strict liability in the context of zero tolerance should be analyzed under this framework because of the interests that students possess in attending public schools. Students are not having their liberty taken from them due to the imposition of zero tolerance, but their rights to an education are being seriously affected. Further, courts have questioned the use of strict liability in other areas of the law involving the deprivation of property interests, even though they do not involve criminal punishment or civil fines.

This Note will explore whether scienter is constitutionally required as an element of a school's zero tolerance policy, and whether the lack of such an intent requirement violates a student's substantive due process rights. Part I looks at Supreme Court decisions interpreting the procedural and substantive due process rights of students. Part II examines the few cases that have analyzed whether zero tolerance policies that lack scienter violate a student's substantive due process rights. Part III points out that federal courts have been hesitant to interfere in public school ad-

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[14] *Ratner*, 2001 U.S. App. LEXIS 16941 at *2.

[15] *Seal*, 229 F.3d at 582 (Suhrheinrich, J., dissenting) (noting that, by and large, the operation of public schools is a state matter).

ministration, but that have the ability to do so if the school policy is not rationally related to a legitimate state interest. Finally, Part IV discusses the several areas of the law where a traditional mens rea is not required in order for a person to be convicted of a crime, and how zero tolerance policies do not fit within any such exception. Part IV further argues that zero tolerance policies that do not take the student's intent into account are irrational and illegal.

I. THE PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS OF STUDENTS

A History of the Court's Jurisprudence

The Fourteenth Amendment of the United States Constitution does not allow states to "deprive any person of life, liberty, or property without due process of law."[16] This Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests."[17] Due process can be divided into procedural and substantive components. Minimal procedural due process entitles parties whose rights have been affected to be notified and heard.[18] Substantive due process grants protection from arbitrary and unreasonable action.[19] These broad rights have not always been afforded to students in public schools. The Supreme Court stated in 1943 that, "The Fourteenth Amendment, as now applied to the States, protects the citizen[s] against the State itself and all of its creatures – Boards of Education not excepted."[20] These rights, though, were not truly defined until much later.

In *Tinker v. Des Moines Independent Community School District*,[21] the Court declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[22] In that case, school administrators had suspended several students who wore black armbands to protest the Vietnam War.[23] Ultimately, the Supreme Court declared that students have the right to free expression absent a substantial disruption that would affect the educational process or the rights of other students.[24] Jus-

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16 U.S. CONST. amend. XIV, § 1.
17 Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
18 Fuentes v. Shevin, 407 U.S. 67 (1972).
19 *Id.* at 81.
20 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
21 393 U.S. 503 (1969).
22 *Id.* at 506.
23 *Id.* at 504.
24 *Id.* at 513-14.

tice Fortas, on behalf of the majority, believed that "[i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."[25] Fortas continued, "[Students] are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[26]

The Court in *Goss v. Lopez*[27] extended such rights to students facing suspension.[28] In *Goss*, nine public high school students were suspended for ten days without a hearing.[29] The Court asserted that "a student's legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause and may not be taken away . . . without adherence to the minimum procedure required by that Clause."[30] The Court concluded that the minimum constitutional standards were that "students facing suspension and the consequent interference with a protected property interest must be given *some* notice and afforded *some* kind of hearing."[31] Though *Goss* is a procedural due process case, which is almost never an issue in zero tolerance expulsions because students are always given some sort of notice and hearing, the Court also asserted other interests that students possess in attending public schools. Those interests include student's interest in protecting his "name, reputation, honor, or integrity."[32] Expulsion or suspension from school would arguably harm a student's reputation and name by affecting their ability to graduate from high school. Such a disciplinary record could also possibly affect that student's chance at gaining admission to college. One might infer that any deprivation of a student's name, reputation, honor, or integrity would violate that student's substantive due process rights.

These constitutional interests were further solidified in *New Jersey v. T.L.O.*,[33] where the Court held that the Fourth Amendment's prohibition on unreasonable searches and seizures applied to the conduct of school administrators.[34] This case involved a student who was disciplined because the school principal searched

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25 *Id.* at 511.
26 *Id.*
27 419 U.S. 565 (1975).
28 *Id.* at 568-70.
29 *Id* at 568.
30 *Id.* at 574.
31 *Id.* at 579.
32 *Id.* at 574.
33 469 U.S. 325 (1985).
34 *Id.* at 336-38.

her purse and found cigarettes and marijuana.[35] The student claimed that that the search violated her Fourth Amendment rights.[36] Though the Court was aware of the increasingly violent nature of schools,[37] it ultimately concluded that the student's privacy concerns outweighed the fears of teachers concerned about student violence.[38] The test the Court articulated for student searches was an attempt to balance "the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order."[39] The Court stated that "the legality of a search of a student should depend simply on the reasonableness, under the circumstances, of the search."[40] Thus, *T.L.O.* backed away from the traditional "probable cause" requirement for searches of individuals,[41] yet still granted students protection from school administrators by mandating that any search of a student needs to be reasonable.

The constitutional rights of students granted in *Tinker* and *T.L.O.*[42] seemed to have been slightly diminished in *Hazelwood School District v. Kuhlmeier*,[43] where the Court held that schools could exercise control over the style and content of student speech in school-sponsored activities such as a school newspaper.[44] The majority explained that this standard would be consistent with the Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges."[45] One might infer that in the wake of *Hazelwood*, student's rights within public schools could be further diminished from the broad rights granted under *Tinker* and *Goss*. But, of course, the implications for zero tolerance policies remain unresolved.

B. The Court's Standard of Review

In general, a government action that burdens the exercise of fundamental rights or liberty interests or that involves suspect clas-

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[35] *Id.* at 328.

[36] *Id.* at 332-33.

[37] *Id.* at 339 (stating that school disorder has "taken particularly ugly forms" such as drug use a violent crime).

[38] *Id.* at 337-42.

[39] *Id.* at 341.

[40] *Id.*

[41] *See* Horton v. California, 496 U.S. 128, 143 (1990); *see also* U.S. CONST. amend. IV.

[42] *See* Wasser, *supra* note 3, at 757 (discussing that free speech is allowed unless it causes a "substantial disruption" or interferes with other's rights).

[43] 484 U.S. 260 (1988).

[44] *Id.* at 273.

[45] *Id.*

classifications is subject to strict scrutiny, and will be upheld only if the action serves a compelling governmental interest and is narrowly tailored to achieve that interest.[46] Examples of fundamental rights include the right to marry, the right to have children, and the right to bodily integrity.[47] The right to attend public schools, however, is not considered a fundamental right.[48] Government actions that do not affect fundamental rights or liberty interests, such as actions interfering with public school attendance, will be upheld under a lesser standard of review. Such actions will be found constitutionally valid if they are considered to be rationally related to a legitimate interest.[49]

Since the right to attend public school is not considered a fundamental right, administrator's actions against a student's interest in attending school must be rationally related to a legitimate state interest.[50] In general, in the context of school discipline, punishment does not implicate substantive due process unless the action is "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."[51] The majority and dissent in one case agreed that this rational basis test was the correct method of review for determining the constitutional nature of zero tolerance policies.[52]

II. ZERO TOLERANCE CASES

A. Seal v. Morgan

The most important case holding that zero tolerance policies, which lack a scienter requirement, violate a student's substantive due process rights is *Seal v. Morgan*.[53] Dustin Seal attended Powell High School in Knox County, Tennessee, during the 1996 school year.[54] Ray Pritchert, a friend of Seal's, was also a student at Powell High School.[55] Pritchert became involved in an ongoing

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[46] Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

[47] *Id.*

[48] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 32-38 (1973).

[49] Vacco v. Quill, 521 U.S. 793, 799 (1997).

[50] Seal v. Morgan, 229 F.3d 567, 574-75 (6th Cir. 2000).

[51] Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305-06 (5th Cir. 1987).

[52] *See Seal*, 229 F.3d at 575, 582. The reasoning and facts of this case are further discussed in Part II.A. of this Note.

[53] 229 F.3d 567.

[54] Benjamin Dowling-Sendor, *What Did He Know and When Did He Know It? A Circuit Court Rules That Students Can't Be Disciplined For Offenses They Don't Know About*, AM. SCH. BD. J., Mar. 2001. at 23.

[55] *See Seal*, 229 F.3d at 570-71.

dispute with another student who began dating his ex-girlfriend.[56] As a result of this dispute, Pritchert began carrying a hunting knife around the school.[57] Ultimately, the knife was placed into the glove box of Seal's mother's car, apparently without Seal's knowledge.[58]

Seal was caught with that knife at a football game at school the next day.[59] After a teacher asked Pritchert and Seal if they had been drinking, the two were asked to talk with the vice-principal. After the vice-principal unsuccessfully searched both Seal and Pritchert for alcohol, he searched Seal's car for a flask. The vice-principal found two cigarettes, a bottle of prescription drugs, and Pritchert's knife in the glove compartment.[60] Several days later, a disciplinary hearing was held and Seal was expelled pursuant to the district's zero tolerance policy for possession of a knife on school grounds.[61]

Seal's father then initiated a suit on his son's behalf pursuant to 42 U.S.C. § 1983.[62] Seal claimed that his expulsion violated his rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and that the search of his mother's car violated the Fourth Amendment.[63]

The majority in *Seal v. Morgan* held that in order for the school district's zero tolerance policy to be constitutionally permissible, it must be rationally related to a legitimate state goal.[64] In other words, the policy must rationally be related to the school's interest in maintaining a safe learning environment for its students and faculty. The court reasoned that "suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest."[65]

The majority based this conclusion on simple logic: a student cannot injure another with a weapon or disrupt the operation of the school if that student is absolutely unaware of having possession

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[56] *Id.* at 571.

[57] *Id.*

[58] Dowling-Sendor, *supra* note 54, at 24. (reporting that evidence later introduced during disciplinary hearings showed that Seal knew that his friend had been carrying around a hunting knife and that Pritchert possessed the knife the night before the two were caught).

[59] *Seal*, 229 F.3d at 571.

[60] *Id.* Note that Seal consented to the search of his car.

[61] *Id.* at 572-73. The issue of whether the search of Seal's car violated his Fourth Amendment rights is not central to the case nor to the issue of whether zero tolerance policies violate the substantive due process rights of students.

[62] *Id.* at 573 (bringing suit under 42 U.S.C. § 1983 (2003)).

[63] *Id.*

[64] *Id.* at 575.

[65] *Id.*

of a weapon.[66] The court also reasoned that the basic rules of criminal law should apply in the case.[67] In most criminal statutes a mens rea element is necessary before one can be convicted of a crime. The court cited several criminal cases where knowledge of possession, or intent was necessary before a conviction could be upheld.[68] In fact, Judge Gillman concluded that this principle is "so obvious that it would go without saying."[69]

To bolster its claim, the majority posed two hypothetical situations where innocent students could be suspended for violating the board's zero tolerance policy. The first such hypothetical involved the school valedictorian who has a knife planted in his backpack without his knowledge by another student and is subject to expulsion for possessing a weapon on school grounds.[70] The second hypothetical situation involved a student who unknowingly drinks the spiked punch at a high school dance and is subject to suspension or expulsion for violating a school policy against drinking at school functions.[71] The majority concluded that this student would be subject to expulsion or suspension for unknowingly drinking the punch, even if the school board was convinced that the student was completely unaware of the presence of alcohol in his drink.[72] Thus, the court believed that suspending innocent students who were unaware that they were carrying knives or drinking alcohol at a school dance would not be rationally related to a legitimate interest in protecting students.

Judge Suhrheinrich, in dissent, stressed that the Supreme Court has cautioned federal courts against interfering in the operation of the public school system.[73] He noted that the Supreme Court in *Goss v. Lopez*[74] expressly stated, "By and large, public education in our Nation is committed to the control of state and local authorities."[75] In fact, Suhrheinrich reiterated the majority's concession that a substantive due process claim would succeed

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[66] *Id.* at 575-76.

[67] *Id.* at 576-77.

[68] *See, e.g.*, United States v. Lewis, 701 F.2d 972 (D.C. Cir. 1983) (holding that to obtain a conviction for constructive possession of a firearm, the government has the burden of showing that the possession was knowing); *see also* State v. Rice, 374 A.2d 128 (Conn. 1976) (concluding that knowing possession was required).

[69] *Seal*, 229 F.3d at 576.

[70] *Id.*

[71] *Id.* at 578.

[72] *Id.*

[73] *See id.* at 582 (Suhrheinrich, J., dissenting) (citing Goss v. Lopez, 419 U.S. 565, 578 (1975)).

[74] 419 U.S. 565 (1975).

[75] *Id.* at 578 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

only in the rare case where there is no rational relationship between the punishment and the offense.[76]

Judge Suhrheinnrich's opinion argued that the board of education's decision was rational even though the zero tolerance policy in place in Knox County did not contain an express scienter requirement.[77] Thus, Dustin Seal's intent to carry the weapon was not required. Suhrheinrich believed that the majority was wrong in stating that the omission of a scienter requirement was irrational because the court had substituted its interpretation of the regulation for that of the school board's. According to the dissent, the board's interpretation of its regulations is entitled to deference.[78] Judge Suhreinrich also argued that a strict weapons policy is rationally related to the state's interest in protecting students, emphasizing the real threat of school violence.[79]

B. Ratner v. Loudoun County Public Schools

Less than a year after the Sixth Circuit decided *Seal v. Morgan*, the United States Court of Appeals for the Fourth Circuit reached the opposite conclusion in *Ratner v. Loudoun County Public Schools*.[80] In that case, decided by unpublished opinion, the court determined that there were no substantive due process violations and that the district's zero tolerance policy was constitutionally permissible.[81] On January 22, 2002, the United States Supreme Court refused to grant certiorari to *Ratner*.[82]

In October 1999, Benjamin Ratner was an eighth grader at Blue Ridge Middle School in Loudoun County, Virginia.[83] A schoolmate told him that she had been suicidal and was contemplating killing herself. She told Ratner that she had brought a knife to school in her binder. Taking the threat seriously, he took the binder from her and put it in his locker.[84]

After hearing about the situation, Fanny Kellogg, the school dean, called Ratner into her office and asked him to retrieve the binder that contained the knife that he had confiscated from his friend.[85] Ratner was then suspended for ten days for possessing a

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[76] *Seal*, 229 F.3d at 575, 582 (Suhrheinrich, J., dissenting) (citing Rosa R. v. Connelly, 889 F.2d 435, 439 (2nd Cir. 1989)).

[77] *Id.* at 582 (Suhrheinrich, J., dissenting).

[78] *Id.* (Suhrheinrich, J., dissenting).

[79] *Id.* (Suhrheinrich, J., dissenting).

[80] No. 00-2157, 2001 U.S. App. LEXIS 16941, at *1 (4th Cir. July 30, 2001) (per curiam).

[81] *Id.* at *6.

[82] Ratner v. Loudoun County Pub. Sch., 534 U.S. 1114 (2002).

[83] *Ratner*, 2001 U.S. App. LEXIS 16941, at *1.

[84] *Id.* at *1-2.

[85] *Id.* at *2.

knife on school grounds in violation of the school's zero tolerance policy.[86] After a hearing, Ratner was suspended for the rest of the term even though Kellogg acknowledged that she thought that Ratner acted in the girl's best interest and did not pose a threat to anyone in the school.[87] Ratner sued claiming that the school board's zero tolerance policy violated his substantive due process rights.[88]

The Fourth Circuit held that "[h]owever harsh the results in this case, the federal courts are not properly called upon to judge the wisdom of [the] zero tolerance policy" that was in place at the middle school.[89] The majority stated that their primary inquiry in the case was "limited to whether Ratner's complaint alleges sufficient facts which if proved would show that the implementation of the school's policy in this case failed to comport with the United States Constitution."[90] Ultimately, the court concluded that the facts alleged in the case did not demonstrate a constitutional violation.[91]

Judge Hamilton, in a concurring opinion, expressed sympathy for Ratner, but concluded that the zero tolerance policy did not violate Ratner's substantive due process rights.[92] Judge Hamilton stated that Ratner's suspension from school was not justifiable, and was "calculated overkill" but thought that the school had the best intentions in trying to maintain a safe school environment. However, while referring to the school's zero tolerance policy, Hamilton felt that "'the road to hell is paved with good intentions.' The panic over school violence and the intent to stop it has caused school officials to jettison the common sense idea that a person's punishment should fit his crime in favor of . . . mandatory school suspension."[93]

C. Bundick v. Bay City Independent School District

Bundick v. Bay City Independent School District,[94] much like *Seal v. Morgan*, began with the discovery of a knife in a student's car, yet the court in Bundick reached a drastically different result. On March 9, 1998, a police dog at Bay City High School smelled

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[86] *Id.* at *3.
[87] *Id.*
[88] *Id.* at *3-4.
[89] *Id.* at *6.
[90] *Id.*
[91] *Id.*
[92] *Id.* at *7 (Hamilton, J., concurring).
[93] *Id.* at *8 (Hamilton, J., concurring).
[94] 140 F. Supp. 2d 735 (S.D. Tex. 2001).

something that alerted it to David Bundick's truck, which was parked in the school lot.[95] The dog's suspicion was reasonable grounds to search the vehicle,[96] and Bundick was summoned to open the truck's cab and toolbox. A machete, or large knife, was uncovered and was immediately seized pursuant to the school's zero tolerance of weapons policy.[97]

A disciplinary hearing was held, and the superintendent expelled him for the remainder of the school term.[98] Bundick filed suit in federal court, claiming, among other things, that his expulsion deprived him of his liberty and property interests in his education without due process of law.[99] The court ultimately dismissed Bundick's claim that the district's disciplinary actions violated his substantive due process rights.[100]

In its opinion, the court first noted that federal courts are "extremely, and quite properly, hesitant to become involved in the public schools' disciplinary decisions."[101] The court believed that for a school administrator's conduct to violate substantive due process, it must "be so offensive that it does not comport with traditional 'decencies of civilized conduct.'"[102] The court's opinion, written by Judge Froeschner, held that the school's actions were not arbitrary, capricious, or irrational. Rather, the court held that the school's actions were compatible with a legitimate state goal of maintaining an atmosphere conducive to learning.[103] Froeschner ultimately disagreed with the court's rationale in *Seal*, stating that "with all due respect to the *Seal* majority, it seems Judge Suhrheinrich, in dissent, has a better understanding of the law in this area. Scienter is not a requirement of the school district's policy, and that policy is entitled to deference."[104]

Froeschner concluded by stating that "[i]t could be hypothesized that a school board could act in a manner so extreme as to violate the substantive due process rights of a student, however this is not that case."[105] The court based its decision on the simple fact that an illegal knife was found in Bundick's possession on

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95 *Id.* at 738.
96 *Id.*
97 *Id.*
98 *Id.* at 739-40.
99 *Id.* at 739.
100 *Id.* at 741.
101 *Id.* at 740.
102 *Id.* (quoting County of Sacramento v. Lewis, 523 U.S. 833 (1998)).
103 *Id.* (quoting Jefferson v. Ysleta Indep. Sch. Dist., 817 F. 2d 303, 305-06 (5th Cir. 1987)).
104 *Id.*
105 *Id.* at 741.

school grounds,[106] which violated the Texas Education Code provision that a student shall be expelled for possessing an illegal knife.[107]

III. FEDERAL COURTS AND SCHOOL DISCIPLINARY DECISIONS

Federal courts, in general, have been reluctant to interfere with the operation of public schools.[108] The Supreme Court initially concluded in *Epperson v. Arkansas*[109] that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities."[110] Though the Court in *Epperson* in fact struck down a state education law, it implied that such intrusion was to be the exception not the rule.[111]

The Supreme Court later concluded in *Wood v. Strickland*[112] that it is not "the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."[113] The students involved in *Wood* claimed that their constitutional rights to due process were violated when they were expelled from school for alcohol possession at school activities.[114] The Court concluded that federal courts' correction of mistakes by school officials should be limited.[115]

Later decisions by appellate courts have continued to express concern about federal judicial intrusion into state school administration. In *Rosa R. v. Connelly*,[116] the Second Circuit held that in school discipline cases, a substantive due process claim "would only be available in a rare case where there was no 'rational relationship between the punishment and the offense.'"[117]

The most recent appellate decision concerning a federal court's interference with public school governance is the Seventh Circuit's decision in *Dunn v. Fairfield Community High School*

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[106] *Id.*

[107] TEX. EDUC. CODE ANN. § 37.007(a)(1)(B) (Vernon 2002).

[108] *See, e.g.*, Seal v. Morgan, 229 F.3d 567,582 (6th Cir. 2000) (Suhrheinrich, J., dissenting).

[109] 393 U.S. 97 (1968).

[110] *Id.* at 104.

[111] *Id.* at 105-06.

[112] 420 U.S. 308 (1975).

[113] *Id.* at 326.

[114] *Id.* at 308.

[115] *Id.* at 308-09.

[116] 889 F.2d 435 (2d Cir. 1989).

[117] *Id.* at 439 (quoting Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 264 (5th Cir. 1985)).

District No. 225.[118] There, the court expressed concern about the prospect of allowing substantive due process to "transform[] the federal courts into an appellate arm of the schools throughout the country."[119] This case involved a suit by two high school students who were given failing grades in their music class for deliberately playing unauthorized guitar pieces at a band concert, which affected one student's ability to graduate with honors.[120] The court thought, much as in *Ratner*, that the board's decision may have been an overreaction, but that there was no constitutional issue.[121]

Thus, there seems to be clear precedent that federal courts become involved in school discipline cases only in rare circumstances. The question that *Seal* essentially wrestled with was whether the lack of scienter in zero tolerance policies is so egregious as to justify such interference.[122] The suspension or expulsion of a student from school for allegedly possessing contraband that has been forbidden by the school's zero tolerance policy, even though the student was unaware of possessing such contraband, seems egregious and should even shock the conscience of the court. Federal courts then are able to justify their entrance into this area of school policy because there is essentially no rational basis for punishing someone who may have never realized that he possessed a weapon.

Proponents of zero tolerance policies argue that the safety of children is a legitimate state interest, and that strict regulations simply further that goal.[123] Ultimately, this cannot justify an outrageous zero tolerance policy. As the majority pointed out in *Seal*, "the Board's Zero Tolerance Policy would surely be irrational if it subjects to punishment students who did not knowingly or consciously possess a weapon."[124] In fact, "[t]o accept the Board's argument [that federal courts should not interfere in this area] would be to allow it to effectively insulate itself even from rational basis review."[125] Ultimately, federal courts should become involved in school discipline cases if they believe that "a reasonable trier of fact could conclude that [the student] was expelled for a

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[118] 158 F.3d 962 (7th Cir. 1998).

[119] *Id.* at 966.

[120] *Id.* at 962.

[121] *Id*; *see also* Ratner v. Loudoun County Pub. Sch., 2001 U.S. App. LEXIS 16941, at *6 (4th Cir. 2001).

[122] *See* Seal v. Morgan, 229 F.3d 567, 576-81 (6th Cir. 2000).

[123] *See* Paul M. Bogos, *"Expelled. No Excuses. No Exceptions." – Michigan's Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311*, 74 U. DET. MERCY L. REV. 357, 378-80 (1997).

[124] *Seal*, 229 F.3d. at 578.

[125] *Id.* at 579.

reason that would have to be considered irrational."[126] Most people, presumably, agree that punishing a student who may have never committed an offense is irrational. The hypothetical student in *Seal* could easily be that innocent person. Subjecting him to punishment, therefore, should be illegal.

The nature of some zero tolerance policies calls into question whether there is any discretion on the part of school administrators to alter the automatic suspension or expulsion of a student who has violated such a school regulation. Such discretion may make these policies less irrational and would save the policy from judicial invalidation. The policies that were in place in Knox County, Tennessee, and Loudoun County, Virginia, did allow the school board some discretion to decide the severity of the punishment altogether, but still did not allow discretion to eliminate punishment itself. In *Ratner*, the court accepted the plaintiff's assertion as true, that the policy in Loudoun County lacked a scienter requirement and thus mandated expulsion for weapons possession. The court stated, "Although we accept Ratner's assertion as true for the purposes of this appeal, we note that his brief's recitation of the school's policies indicates that possession of a weapon on school grounds would not necessarily result in long term suspension." The court continued, stating that "board policy in such cases apparently begins with a presumption that offending students will be expelled (permanently removed) but allows school officials discretion to subject offending students 'to such lesser disciplinary action.'"[127] A similar modification provision existed in the *Seal* school district. According to Knox County school policy, "The Superintendent may modify the length of the explusion [sic] or he may uphold the recommendation of the principal for explusion [sic] for a calendar year." [128]

These zero tolerance policies at issue in *Ratner* and *Seal* assume that the student was guilty of a violation (by possessing a knife or other contraband) until proven innocent of a lesser offense. Such a policy, on its face, does not seem as egregious as a strict zero tolerance policy where there is absolutely no discretion on the part of the school board. The dissent in *Seal* argued that this policy "affords the student an opportunity to rebut the presumption of scienter, thereby guaranteeing that the zero tolerance

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[126] *Id.*

[127] Ratner v. Loudoun County Pub. Sch., 2001 U.S. App. LEXIS 16941, at *4 n.2 (4th Cir. 2001).

[128] KNOX COUNTY BD. OF EDUC., KNOX COUNTY BOARD OF EDUCATION ZERO TOLERANCE EXPULSIONS POLICY (issued Sept. 1, 2000), *available at* http://www.kcs.k12tn.net/handbook/j/jccc2.html.

policy is reasonably applied." [129] What the dissent in *Seal* fails to take into consideration is that scienter is still lacking. A student, like Ratner, can be caught with a knife on school grounds and, after he is given his procedural due process right to a hearing, can be automatically expelled, or the board of education has the option to automatically suspend him for the rest of the school year. Either way, the school board automatically disciplines this student without determining whether he intended to violate the school policy. The possible reduction in punishment really only softens the blow of zero tolerance policies that are unfairly applied in many circumstances.

Thus, the ability of the federal court to intervene may be justified. In addition to lacking wisdom and compassion, the application of zero tolerance policies illustrate the rare case where school boards cannot provide a rational relationship between the punishment and the offense committed. Though federal courts should be worried about allowing substantive due process claims to transform these courts into an appellate arm of schools, zero tolerance policies are serious regulations whose constitutionality should be decided by federal courts.

IV. SCIENTER AND SCHOOL DISCIPLINE

A. *The Need for Mens Rea in Criminal Statutes*

As the majority in *Seal* stated, many criminal statutes do not contain an intent requirement.[130] Legislatures can create offenses not requiring scienter in some circumstances when it is necessary to do so in the public interest.[131] Further, many states and the Model Penal Code provide that a defendant who is "willfully blind" regarding a material fact possesses the equivalent of knowledge of the fact.[132] For example, federal judges give juries the so-called "ostrich instruction," which informs the jury that "[n]o person can intentionally avoid knowledge by closing his or her eyes to facts which should prompt him or her to investigate."[133]

The Supreme Court's guidance regarding the need for mens rea is relatively clear, but its implications in the realm of zero tol-

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[129] *Seal*, 229 F.3d at 585 (Suhrheinrich, J. dissenting).

[130] *Seal*, 229 F.3d at 577.

[131] 22 C.J.S. *Criminal Law* § 32 (2002).

[132] United States v. Ramsey, 785 F.2d 184, 189 (7th Cir. 1986) ("[A] person with a lurking suspicion goes on as before and avoids further knowledge, this may support an inference that he has deduced the truth and is simply trying to avoid giving the appearance (and incurring the consequences) of knowledge."); Model Penal Code § 2.02 (2) (2000).

[133] *Ramsey*, 785 F.2d at 189.

erance regulation is not. The Court in *Staples v. United States*[134] held that the absence of a mens rea requirement in a statue does not necessarily suggest that the legislature intended to dispense with it and that the court must construe the statute in light of background rules of common law in which some type of mens rea is generally required.[135] *Staples* also provided the groundwork for whether the crime in a particular statute should be considered a public welfare offense, where no mens rea would be required. Such an offense involves "dangerous and deleterious devices that will be assumed to alert an individual that he stands in 'responsible relation to a public danger.'"[136] Courts have interpreted threats to public health and safety sufficient in themselves "to place the defendant on notice of the likelihood of regulation and thus to excuse the need to prove mens rea."[137]

Proponents of zero tolerance policies argue that the Gun-Free Schools Act[138] was adopted to serve the public interest and welfare. As most Americans already know, school violence has reached alarming levels. During the 1997-98 school year, forty students were killed on school property.[139] No one will ever forget the tragic events at Columbine High School in Littleton, Colorado, where two armed students invaded their school with automatic weapons.[140] The creation of a strict zero tolerance policy may serve the public welfare. Admittedly, attending public school has become dangerous. Students have to pass through metal detectors and other means of detection more than ever in order to gain entrance to school. Zero tolerance policies, presumably, aid in the protection of students and faculty and could possibly serve the public welfare. Thus, they would not be subject to the traditional need for mens rea.

Generally, though, public welfare offenses have "been crimes punishable by relatively light penalties such as fines or short jail sentences, rather than substantial terms of imprisonment."[141] Courts have interpreted public health and safety offenses as those where the penalties are small and do not do grave harm to the of-

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[134] 511 U.S. 600 (1994).

[135] *Id.* at 618.

[136] *Id.* at 613.

[137] United States v. Wilson, 133 F.3d 251, 263 (4th Cir. 1997).

[138] 20 U.S.C. § 8921 (2000) (repealed 2002).

[139] *See* Erin Kelly, *School Safest Place for Kids Despite Violence, Study Finds*, CINCINNATI ENQUIRER, July 29, 1998, at A10.

[140] Matt Bai, *Death at Columbine High, Anatomy of a Massacre*, NEWSWEEK, May 3, 1999, at 22.

[141] United States v. Ahmad, 101 F.3d 386, 391 (5th Cir. 1996).

fender's reputation.[142] Thus, when the penalties for an offense are small, the traditional mens rea requirement can be dispensed with. Whether the penalties are small in school suspension cases is difficult to determine. A light suspension may not be considered a severe penalty, but many times the use of zero tolerance is used to expel students permanently or for a substantial time. While some students will be sent to alternative educational institutions and others will attend private schools, there is the chance that expulsion from school will end that student's educational career. Expulsion from school then may be considered a severe penalty. Even a brief suspension from school would likely end up in a student's permanent record. This blemish on a student's file could affect his chances at gaining admission to college and have other devastating effects. Thus, analyzing these policies under the criminal law, a zero tolerance policy lacking scienter, which substantially harms or punishes a student, would not be considered a public welfare offense and would be unconstitutional.

In addition to the Supreme Court's guidance on strict liability crimes and public welfare offenses, other courts list factors to be considered in determining whether a statute sets forth a strict liability crime in the first place.[143] Though the absence of a mens rea element seems clear in the zero tolerance policies found in many school districts,[144] including the policies that existed in Knox and Loudoun Counties, looking at the factors to be considered when such a statute is ambiguous is helpful in analyzing the constitutionality of zero tolerance policies in general. Courts usually look at the number of prosecutions expected, the seriousness of the harm to the public that the statute seeks to prevent, whether the crime is one for which it would be difficult and time consuming for the prosecution to prove fault, and the extent to which a strict liability crime would encompass innocent conduct.[145]

The lack of scienter in zero tolerance policies probably will not be justified under this approach. First, logically speaking, the number of students who are disciplined every day in America's schools far exceeds the number of criminal prosecutions. The court in *Seal* mentioned the problems that would exist if students

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[142] *See, e.g.*, United States v. Smith, 29 F.3d 270, 272-73 (7th Cir. 1994) (affirming defendant's conviction for violation of the Migratory Bird Treaty Act because she had knowingly possessed bald eagle feathers).

[143] *See, e.g.*, State v. Ungerer, 621 N.E.2d 893 (Ohio Ct. App. 1993) (discussing the importance of strict liability offenses in the operation of a motor vehicle and not allowing a defendant to plead not guilty by virtue of insanity); *see also* United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (finding that mens rea was required for a violation of the Clean Water Act).

[144] *See* TENN. CODE ANN. § 49-6-4216 (2002).

[145] State v. Semakula, 946 P.2d 795 (Wash. Ct. App. 1997).

were allowed to litigate in federal court every time they were disciplined at school.[146] Though the number of expulsion cases may be limited in relation to ordinary school discipline, the ability of schools to prosecute each expulsion would be more difficult without zero tolerance policies. However, criminal justice, in general, would be easier if all offenses were strict liability; therefore, this factor is not determinative.

Second, zero tolerance policies do relieve the prosecution of time-consuming and difficult-to-prove cases. It would likely take more time and energy, on the behalf of school administrators investigating school misconduct, to give students more rights when they are faced with suspension or expulsion. In addition, in school discipline cases, proof of fault is difficult. Every day, principals have to ask, "Who started the fight?" and have to investigate violations of school policy. Zero tolerance policies that lack scienter do ease the problems that are associated with running a public school, yet the suspension of students' constitutional rights in order to make teachers' and administrators' jobs easier is not likely to make this factor determinative either.

Third, serious harm to the public exists if schools become dangerous places to learn. Not only is the safety of students and faculty in jeopardy, but the maintenance of a safe and effective school system also affects the economic stability of property values within the school district.[147] A safe and effective school system increases property values, while a downtrodden school system decreases home values in a particular district.[148] After all, schools educate individuals who will eventually be leaders in their own communities. The safe and efficient operation of public schools, through the use of zero tolerance policies, may arguably help to make schools safer.

The last factor is most relevant to zero tolerance policies. Though these regulations seem to satisfy the prior factors, the last, and arguably most important one, is that zero tolerance policies that do not consider the intent of the student encompass a great deal of innocent conduct. For example, in *Lyons v. Penn Hills School District*,[149] a seventh grade student was expelled for having

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[146] Seal v. Morgan, 229 F.3d 567, 575 (6th Cir. 2000).

[147] *See* Press Release, Yes on Proposition 26 Press Center (Feb. 22, 2000), *available at* http://www.letsfixourschools.org/presscenter/pr_022800_sandiego.html ("As realtors, we know quality schools attract stable caring families to neighborhoods and enhance the value of our homes" (quoting William Johnson, President of the San Diego Association of Realtors)).

[148] USC LUSK CENTER, SOUTHERN CALIFORNIA REAL ESTATE SUMMIT REPORT 3 (Sept. 13, 2001), *available at* http://www.usc.edu/lusk.

[149] 723 A.2d 1073 (Pa. Commw. Ct. 1999).

a Swiss Army knife in school. An eight-year-old girl in Louisiana was expelled from the second grade for bringing her grandfather's pocket watch which contained a small knife on the fob to show and tell,[150] and in Virginia, a high school student was given a ten-day suspension for taking a sip of mouthwash in class. The mouthwash contained alcohol, which violated the school's zero tolerance policy.[151] Of course, the encompassment of such innocent behavior has led to the backlash against these policies. Undoubtedly this is because their imposition can often be cruel and unfair, as in *Ratner*. It seems absurd to punish a boy like Ratner, who arguably saved his friend's life by taking away the knife that she said she was going to kill herself with, just as it is absurd to suspend a student for taking a sip of mouthwash. It is counterproductive to discourage decency and heroism in the name of a zero tolerance policy that seemingly aims to protect students.

Ultimately, considering the factors that courts look at when determining whether a mens rea element is absent, and considering the requirements in *Staples* regarding strict liability offenses,[152] zero tolerance would be unconstitutional under the criminal law. Zero tolerance policies lacking scienter do not fit within the public welfare exception to mens rea because of the sometimes-harsh penalties associated with their imposition. Further, these policies do not fulfill the general requirements that courts look to when deciding if a statute sets forth a strict liability crime because they encompass very innocent conduct like taking a sip of mouthwash in class, or bringing a Swiss Army knife to school.

B. When Strict Liability Is Constitutional

Courts do suspend the mens rea requirement for other crimes that are not considered public welfare offenses. These crimes impose severe penalties, including long terms of imprisonment. Generally, in statutory rape cases, correctional facility discipline cases, and automatic weapons possession cases, courts will not look at scienter. These cases, though, are very different from and serve different purposes than zero tolerance legislation. In *United States v. Cordoba-Hincapie*,[153] the United States District Court for the Eastern District of New York reviewed the history and imposition of strict liability crimes in an extremely detailed opinion. The

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[150] *See* Jessica Portner, *Zero Tolerance Laws Getting a Second Look*, EDUC. WK., Mar. 26, 1997, at 14.

[151] *Id.* at 10.

[152] *See supra* notes 134-37 and accompanying text.

[153] 825 F. Supp. 485 (E.D.N.Y. 1993).

defendants in the case were charged with intentionally importing heroin into the United States.[154] Judge Weinstein began the opinion by detailing the types of crimes that have historically not included a mens rea element. First were public welfare offenses, such as "minor violations of the liquor laws, the pure food laws, the anti-narcotics laws, motor vehicle and traffic regulations, sanitary, building and factory laws and the like."[155] The court then discussed the other forms of strict liability, stating that "[t]he most widely recognized form of strict liability outside the realm of public-welfare offenses probably is the doctrine, embodied in statute and upheld by courts in a majority of states, that the perpetrator of the crime of 'statutory rape' [is subject to strict liability]."[156]

Numerous state cases discuss statutory rape.[157] A recent case from the Utah Court of Appeals[158] upheld a law making consensual sex with a minor a strict liability offense, stating that the law rationally furthered the legitimate governmental activity of protecting children from sexual abuse.[159] Rejecting the nineteen-year-old defendant's attempt to introduce evidence that he was reasonably mistaken as to the age of the victim, the court concluded: "This statutory scheme reflects our legislature's careful consideration of the level of protection required for minors of different ages . . . . [T]he statute rationally furthers a legitimate governmental interest." The court went on to state, "It protects children from sexual abuse by placing the risk of mistake as to a child's age on an older, more mature person who chooses to engage in sexual activity with one who may be young enough to fall within the statute's purview."[160] The court's rationale regarding the need for a strict liability statutory rape law in Utah is based upon the similar premise that the dissent argued for in *Seal*, the protection of children. The *Seal* dissent reached this conclusion based upon increasing violence in America's schools and the need to protect children from that violence.[161]

Though zero tolerance policies arguably protect children from violence by making schools safer, it seems equally likely or more

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[154] *Id.* at 488.

[155] *Id.* at 496.

[156] *Id.* at 497.

[157] *See, e.g.*, Anderson v. State, 438 P.2d 228 (Alaska 1968) (affirming an indictment upon two counts of statutory rape and two counts of contributing to the delinquency of a minor); People v. Osband, 919 P.2d 640 (Cal. 1996) (discussing victim's testimony that she believed defendant was accused of statutory rape).

[158] State v. Martinez, 14 P.3d 114 (Utah Ct. App. 2000).

[159] *Id.* at 120.

[160] *Id.* at 119-20.

[161] Seal v. Morgan, 229 F.3d 567, 582-83 (6th Cir. 2000).

plausible to argue that these policies harm children due to abuses by school administrators through unequal and harsh imposition. Further, it seems difficult to see how strict liability zero tolerance policies protect children the way that statutory rape laws protect young children from the sexual exploitation of adults. The traditional rationale for statutory rape as a strict liability offense has to do with the long-term psychological and physical effects that are likely to befall the victim.[162] It is not clear that similar harms can be expected from students bringing alcoholic mouthwash to class or students engaging in other innocent behavior. Such behavior is not as serious or as damaging to society as the crime of statutory rape because of the psychological and physical effects of that crime, namely pregnancy and disease.

In another statutory rape case, *United States v. Ransom*,[163] the defendant was charged with having sexual intercourse with a girl under the age of twelve. The court in this opinion reasoned that in order to show that a strict liability statute was inconsistent with due process, the defendant "must demonstrate that the practice adopted by the legislature 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[164] The court then mentioned that the history of the offense of statutory rape indicates that from ancient times the law has afforded special protection to those deemed too young to understand the consequences of their actions.[165] Statutory rape, as an exception to the mens rea requirement, is needed to protect innocent children from sexual exploitation. It does not follow that the same protection is needed for children attending public schools to be free from the effects of violence. Guards and other security devices can be used in school districts with severe problems. Further, as the *Ransom* court noted, statutory rape has a long tradition of being an exception to the traditional mens rea requirement. Zero tolerance policies, on the other hand, are recent policy decisions that lack such a fundamental tradition.

Another area of the law, where scienter is not required, is the governance of correctional facilities. *People v. Ramsdell*[166] held that possession of contraband by a prisoner is a strict liability crime and accordingly, the trial court refused to allow the defendant to present evidence to support theories that he did not know

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[162] *See* Michael M. v. Super. Ct., 450 U.S. 464, 468-71 (1981) (stating that preventing teenage pregnancy was the primary aim of the legislation).

[163] 942 F.2d 775 (10th Cir. 1991).

[164] *Id.* at 777 (quoting Snyder v. Massachusetts, 291 U.S. 97 (1934)).

[165] *Id.*

[166] 585 N.W.2d 1 (Mich. Ct. App. 1998).

that a package contained drugs and that he possessed the package under duress.[167] In that case, a corrections officer at the prison testified that he saw the defendant in his cell cutting up small, white pieces of paper into one to two inch squares.[168] The guard explained that in his experience as a correctional officer, such small squares of paper were used to package cocaine. After a search of the prisoner's cell and a subsequent lab examination of the drugs seized, they tested positive as marijuana.[169]

The Michigan statute in question provides that "a prisoner shall not possess any alcoholic liquor, prescription drug, poison, or controlled substance."[170] The court concluded that in enacting the statute, the legislature straightforwardly set out two, and only two, elements of the crime: a prosecutor must prove beyond a reasonable doubt that the defendant is in a fact a prisoner and that the defendant possessed a controlled substance.[171] Believing that "there is a straightforward reason, requiring no great amount of thought or interpretation, for imposing a different, and stricter, standard on prisoners than on the general population,"[172] the court explained that prisoners are:

> after all, convicted criminals whose liberty is restricted by law and who are confined, after all, in the controlled, but often volatile, environment of a state prison. To require a *knowing* possession of drugs as an element of the crime for the general populace while omitting such a requirement for prisoners is, when viewed in this context, indeed sensible.[173]

The Michigan legislature's creation of a strict liability offense for contraband possession and the court's rationale for such a law seem plausible. After all, these are prisoners confined in a correctional facility who have committed crimes and who have had their liberty taken away from them. In order to effectively govern correctional facilities, the mens rea exception seems necessary. In school discipline cases, however, the mens rea exception does not make sense. Schools have not become the "often volatile environment" that prisons are. Though some school districts undoubtedly have serious problems with maintaining security of the stu-

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[167] *Id.* at 5. Also note that in the governance of federal prisons, strict liability for possession of contraband exists as well. United States v. Holt, 79 F.3d 14 (4th Cir. 1996).

[168] *Ramsdell*, 585 N.W.2d at 3.

[169] *Id.*

[170] *See* MICH. COMP. LAWS ANN. § 800.281(4) (West 2000).

[171] *Ramsdell*, 585 N.W.2d at 4.

[172] *Id.* at 5.

[173] *Id.*

dent body, many districts do not. By imposing the same types of regulations upon school children as exist in prisons, the "vigilant protection of constitutional freedoms . . . in the community of American Schools"[174] is lost. Ultimately, the mens rea exceptions found in the *Seal*, *Ratner*, and *Bundick* school districts do not seem as necessary as the *Ramsdell* exception for prisoner possession of contraband. Of course, the fact that the strict liability exception to mens rea in schools is not as needed as it is in dangerous prisons does not mean that zero tolerance policies are unconstitutional. One only has to use common sense, though, to see that students are being subjected to arbitrary rules without regard to circumstances. Society should not tolerate eliminating the intent of students in the imposition of zero tolerance policies in the same way as society tolerates the elimination of mens rea in the governance of America's prison population.

Courts have also upheld strict liability statutes banning the possession of automatic weapons, in essence, because of their intrinsic danger.[175] At oral argument in *Seal*, the board of education presented the case of *Peoples Rights Organization v. City of Columbus*[176] to support its contention that the Sixth Circuit has found exceptions to the mens rea requirement in some areas of weapons possession. Presumably, this case was introduced to justify the imposition of strict liability for Seal's possession of a knife. Though the court did conclude that a city ordinance could impose strict liability for assault weapons possession, the *Seal* court believed that the case did not support the Board's position.[177]

The *Seal* majority explained that strict liability, in the context of a weapons possession statute

> at most means that the government would not need to prove that the defendant knew he was violating the law, or that the weapon possessed the attributes that make it a specific type of weapon – an assault weapon or machine gun, for example – that is likely the subject of heavy regulation or prohibition."178

The court concluded that nothing in the case "even remotely suggests that a defendant can be convicted for the unknowing possession of an item that is later revealed to be a statutory 'assault

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[174] *See* Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[175] *See* Staples v. United States, 511 U.S. 600, 605 (1994) (discussed in more detail at *supra* notes 134-46 and accompanying text).

[176] 152 F.3d 522 (6th Cir. 1998).

[177] *See id.* at 534-35; *see also* Seal v. Morgan, 229 F.3d 567, 577 (6th Cir. 2000).

[178] *Seal*, 229 F.3d at 577.

weapon.'"[179] Thus, though strict liability for assault weapons possession is not unconstitutional, the prosecution would still need to prove that the defendant intended to possess a weapon in the first place.

Applying this ruling to zero tolerance policies, the school district would still need to prove that the student intended to possess a knife in the first place. Though intent may be inferred from the student's possession of the knife in *Seal*, *Ratner*, or *Bundick*, some sort of hearing would need to be held to determine whether such an inference has any justification. If a logical inference could be determined, then possibly these students could have been suspended or expelled. It was the automatic presumption of guilt applied in each of these three cases that violated the student's substantive due process rights, since the zero tolerance policies that existed never required the school authorities to determine whether the student actually intended to possess the weapon in question. Such proof should be required in America's public schools. This type of inquiry would allow school administrators to determine whether a student accidentally left the contraband in his truck or whether he intended to bring it to school.

Thus, though there are exceptions in criminal law to the traditional need for mens rea, each exception is not applicable in the context of school zero tolerance policies. Zero tolerance policies cannot fit within the mens rea exceptions found in public welfare laws. There, the infractions result in fines or other light punishment. As illustrated, the expulsion from school represents a serious punishment that could end a student's educational career. In addition to public welfare cases, other strict liability crimes have been found to be constitutional where punishment can be severe: in statutory rape cases, correctional facility cases, and automatic weapons possession cases, the law has carved out unique exceptions to the need for mens rea. Zero tolerance policies, however, do not fit within any of these exceptions. Zero tolerance lacks the long-standing tradition and purpose that statutory rape possesses; it lacks the necessity of correctional facility strict liability; and it is ultimately not the same as strict liability for assault weapons possession because the intent to carry a weapon is still needed in such cases. Such intent is never needed in zero tolerance policies that lack scienter.

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[179] *Id.*

C. *The Resurgence of Mens Rea*

Almost fifty years ago, the Supreme Court in *Morrissette v. United States*[180] declared that "an injury can amount to a crime only when inflicted by intention. [This] is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability . . . to chose between good and evil."[181] In fact, most modern scholars reject the concept of strict liability, believing that punishing conduct without reference to the actor's state of mind fails to reach the desired end and is unjust.[182] Many commentators believe that "conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as [being] socially dangerous."[183]

Others contend that the essential facet of liability is blameworthiness. On this view "the predicate for all criminal liability is blameworthiness; it is the social stigma which a finding of guilt carries that distinguishes the criminal [penalty] from all other sanctions. If the predicate is removed, the criminal law is set adrift."[184] In fact, the Model Penal Code generally requires some kind of culpability, requiring a purposeful, knowing, reckless, or negligent state of mind.[185] Though the Code does recognize strict liability offenses, those offenses are defined as wrongs subject only to a fine, forfeiture, or other civil penalty.[186]

The hypothetical student who innocently drinks the spiked punch at the school dance is not blameworthy. He has done nothing wrong that should subject him to punishment. In addition, punishing him will not deter anyone from committing the same act in the future. Looking at *Ratner*, the student who saved his friend's life was not blameworthy. His punishment, though, will deter future conduct. Unfortunately, it will deter students from attempting to help a potentially suicidal student who is carrying a knife and threatening to kill herself.

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180 342 U.S. 246 (1952).

181 *Id.* at 250.

182 *See* Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (1962).

183 *Id.*

184 Richard G. Singer, *The Resurgence of Mens Rea: III - The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 404-05 (1989).

185 MODEL PENAL CODE § 2:02 (2000).

186 *Id.* at §§ 1.04, 2.05.

In addition, the criminal law, as expressed in the Model Penal Code and in the opinions of scholars, has tended to shy away from the use of strict liability crimes because they do not satisfy the historic rationales for punishment. Usually, punishment is imposed because of general deterrence, individual deterrence, incapacitation, and reform.[187] Punishing a student who was unaware that he was possessing contraband that was prohibited by a zero tolerance policy will not deter the general student body nor will it deter that student. Of course, you cannot deter a student from drinking the spiked punch at a school dance if the student does not know that the punch was spiked. Presumably, zero tolerance policies will incapacitate that student from coming to school, but this will not "prevent persons of dangerous disposition from acting upon their destructive tendencies."[188] After all, the student kept from school could have been the valedictorian who had the knife planted in his backpack. The imposition of zero tolerance will not reform this student because he may not have known that he committed a violation. How can you reform someone who may have done nothing wrong in the first place? It is no wonder that the Model Penal Code and many scholars reject the imposition of strict liability. The problem with such liability is no more evident than in zero tolerance legislation.

D. The Unconstitutionality of Non-Criminal Strict Liability Offenses

The strict liability exceptions discussed at length have been exceptions to the criminal law. School discipline cases, of course, are not criminal matters. However, the majority in *Seal* argued that the legality of zero tolerance policies that lack a scienter requirement should be analyzed under this criminal framework.[189] Other courts have struck down such policies as unconstitutional in areas of the law where the affected party had a property interest only, and was not subjected to criminal penalties.

A recent case from the Ninth Circuit struck down a Housing and Urban Development ("HUD") policy that created a "One Strike and You're Out" rule for residents in HUD housing for pos-

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[187] 4 KENT GREENAWALT, ENCYCLOPEDIA OF CRIME AND JUSTICE 1340-41 (Sanford H. Kadish ed., 1983). General deterrence presumes that knowledge that punishment will follow a crime deters people from committing crimes in the first place. Individual deterrence means that the actual imposition of punishment creates fear in the offender that if he repeats his acts, he will be punished again. Reform states that punishment will help to reform the criminal so that his wish to commit crimes will be lessened. Incapacitation means that imprisonment puts convicted criminals out of the general population. *Id.*

[188] *Id.* at 1341.

[189] *See* Seal v. Morgan, 229 F.3d 567, 576-77 (6th Cir. 2000).

session of drugs on or around these housing facilities.[190] Though the decision was reversed by the Supreme Court,[191] the appellate court's arguments and the Supreme Court opinion shed light on the constitutionality of zero tolerance policies. The appellate court refused to accept HUD's interpretation of a statute that failed to investigate the scienter of the tenant who possessed drugs. In fact, the court stated: "[W]e need look no further than the facts of this case for an example of the odd and unjust results that arise under HUD's interpretation."[192] The statute in question states:

> To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's [Public Housing Authority] public housing premises by other residents or employees of the PHA, or
>
> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.[193]

When these regulations were issued, HUD gave the local public housing authorities authority to evict a tenant whose household members or guests were involved in drug activity, whether the tenant knew or should have known of the activity or tried to prevent the activity.[194] In fact, in 1996, President Clinton announced the "One Strike and You're Out" policy and tied federal funding to increased evictions regardless of the circumstances.[195]

The facts of the case clearly make the resulting eviction odd and unjust. Pearlie Rucker, a sixty-three-year-old woman, lived

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[190] *See* Rucker v. Davis, 237 F.3d 1113, 1116 (9th Cir. 2001) *rev'd by* 122 S.Ct. 1230(2002).

[191] Dep't of Hous. and Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002).

[192] *Rucker*, 237 F.3d at 1124.

[193] *Id.* at 1116 (citing 24 C.F.R. § 966.4(f)(12)(i) (2002)).

[194] *See* 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991) (to be codified at 4 C.F.R. pt. 966) ("The tenant should not be excused from contractual responsibility by arguing that the tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.").

[195] *See* John F. Harris, *Clinton Links Housing Aid to Eviction of Crime Suspects; Civil Libertarians Attack 'One Strike' Policy That Affects Defendants Not Yet Convicted*, WASH. POST, Mar. 29, 1996, at A.

with her mentally disabled daughter and her two grandchildren in an Oakland Housing Authority ("OHA") complex in Oakland, California. The OHA sought to evict Rucker because her daughter was found in possession of cocaine three blocks from the apartment.[196] Rucker asserted that she regularly searched her daughter's room for evidence of alcohol or drug use and had never found any evidence of such use. Three other tenants were also evicted for similar reasons and sought a preliminary injunction enjoining the unlawful detainer actions against them and against enforcement of HUD's regulation and the corresponding provision in the OHA lease.[197]

One of the reasons the United States Court of Appeals for the Ninth Circuit held that that this statute was unconstitutional was because of the absurd result: "It is well established that we will not assume Congress intended an odd or absurd result."[198] Looking at the case at hand, the court stated that "HUD conceded at oral argument that there was nothing more Pearlie Rucker could have done to protect herself from eviction, but argued that the statute authorized her eviction nonetheless."[199] In fact, HUD took the position that "the statute would apply and permit eviction of an entire family if a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana, even if the parents had no idea the child had ever engaged in such activity."[200]

The court stated, "Penalizing conduct that involves no intentional wrongdoing by an individual can run afoul of the Due Process Clause."[201] Its reasoning was that public housing tenants have a property interest in their tenancy,[202] and that HUD's strict liability interpretation of the statute would permit tenants to be deprived of their property interest without any relationship to individual wrongdoing.[203]

The Supreme Court unanimously reversed the opinion of the United States Court of Appeals for the Ninth Circuit, stating that HUD was not trying to criminally punish members of the public, but was instead acting as a landlord, "invoking a clause in a lease

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196 *Rucker*, 237 F.3d at 1117.

197 *Id.*

198 *Id.* at 1124 (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 69-70 (1994); Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 453-55 (1989)).

199 *Rucker*, 237 F.3d at 1124.

200 *Id.*

201 *Id.* at 1124 (citing Scales v. United States., 367 U.S. 203, 224-25 (1961)).

202 *See* Greene v. Lindsey, 456 U.S. 444, 450-51 (1982) (declining to resolve a constitutional question based on whether an action is "more properly characterized as one in rem or in personam").

203 *Rucker*, 237 F.3d at 1125.

to which respondents have agreed and which Congress has expressly required."[204] Further, the Court held that the statute does not lead to absurd results because the statute does not require the eviction of any tenant who violates the lease provision. Instead, it "entrusts that decision to the local public housing authorities, who are in the best position to take account" of the level of drug or crime activity.[205] It is unclear whether the Court is stating that zero tolerance, in general, is constitutionally permissible if the local authority imposing such a policy has the discretion to sanction – meaning that it is constitutional for a local school district or housing authority to implement a zero tolerance policy if that authority is provided discretion to use it. Such a result seems less egregious, yet still imposes punishment without regard to fault.

E. Balancing the Safety of Schools with Students' Constitutional Rights

Most people would agree that the function of public schools should be to educate students. In order to do this, schools need to teach children to be responsible members of society. Yet, schools also need to be safe places to learn. In order to balance the two competing interests, a fine line needs to be drawn between students' due process rights and the safety of the schools that they attend.

As the concurring opinion in *Ratner* stated, "There is no doubt that this zero-tolerance/automatic suspension policy, and others like it adopted by school officials throughout the nation, were adopted in large response to the tragic school shootings that have plagued our nation's schools over the past several years."[206] In response to these events, school districts across the country needed to respond. They needed to do something to assure the community that their children were safe. Judge Hamilton continued in his *Ratner* concurrence to state that "no doubt exists that in adopting these [zero-tolerance] policies, school officials had the noble intention of protecting the health and safety of our nation's school children and those adults charged with the profound responsibility of educating them."[207] Unfortunately, those best of intentions have gone awry.

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[204] Dep't of Hous. and Urban Dev. v. Rucker, 122 S. Ct. 1230, 1236 (2002).

[205] *Id.* at 1235.

[206] Ratner v. Loudoun County Pub. Sch., 2001 U.S. App. LEXIS 16941, at *8 (4th Cir. 2001) (Hamilton, J., concurring).

[207] *Id.* (Hamilton, J., concurring).

Of course, the need to protect students is a serious concern of educators and of the community. Yet, the protection of students' constitutional rights is also important. Students should not and do not possess all the rights that others who are not confined within the schoolhouse gates possess. As the *Bundick* court noted, "The Due Process Clause does not necessarily provide the right [of students] to secure counsel, the right to confront and cross-examine witnesses supporting the charges, or the right to call witnesses in one's defense."[208] Of course, the need to protect students and maintain discipline does not allow students to be assured all of the guarantees that are afforded others. Students, though, should be afforded basic substantive due process protections and, in the hysteria of school shootings, school districts have ignored these basic protections in order to make sure that the school shootings that have happened across the country will not happen in their schools. Thus, the balance between these two competing interests has been upset by zero tolerance policies that lack a scienter requirement.

CONCLUSION

Zero tolerance policies, which do not consider the intent of the student, are not rationally related to any government interest. Though the protection of children is a seemingly viable interest, the application of zero tolerance is not a rational way to achieve every school district's goal of providing safe and effective schools. These policies are not even reasonable because of the harm they sometimes cause innocent children. Though the Supreme Court has clearly limited students' rights, it has not abandoned them.

In addition, although federal courts have been hesitant to interfere in this area of state control, zero tolerance policies have become a divisive issue. Further, courts that have decided these issues agree that any school policy that is not rationally related or that shocks the conscience of the court violates a student's constitutional rights. Zero tolerance policies should shock the conscience of the court because of their devastating effects upon innocent students. In addition, these policies teach children that the law is often unfair and unreasonable. These are not the types of lessons that should be taught everyday in America's public schools.

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[208] Bundick v. Bay City Indep. Sch. Dist., 140 F. Supp. 2d 735, 740 (S.D. Tex. 2001).

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